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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 110

THOMAS A. GUSIK, A MINOR, BY HIS FATHER AND NEXT FRIEND, JOHN GUSIK,

Petitioner,

vs.

L. C. SCHILDER, WARDEN, FEDERAL REFORMATORY, CHILLICOTHE, OHIO,

Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Throughout the brief of the respondent it is asserted that the review provided under Article of War 53 is a "better one" and should be used in lieu of the filing of writ of habeas corpus in the Federal District Court. This Court has reiterated from the case of *In Re Grimley*, 137 U. S. 147, through the pronouncements of *Humphrey* v. *Smith*, 336 U. S. 695, *Wade* v. *Hunter*, 336 U. S. 684, *Hiatt* v. *Brown*, 339 U. S. 103, that the Federal District Courts have jurisdiction to inquire into and test the jurisdiction of a Court-Martial Board. In the event the Court-

Martial Board was without jurisdiction such conviction is void *ab initio*, and the Federal Courts have the power to so declare if they find jurisdiction lacking.

The Federal District Court, in the instant case, found that the Court-Martial Board did not have jurisdiction to try or sentence the within petitioner. The District Court granted the writ of habeas corpus because the Court-Martial Board did not have jurisdiction. The Sixth Circuit Court of Appeals did not pass upon the lack of jurisdiction of the Court-Martial Board, but held that the *District Court* did not have jurisdiction by reason of Article of War 53 being enacted by Congress ten months after the filing of the within writ of habeas corpus in the District Court.

One of the legal questions thus narrowed down for consideration by this Court is whether Article of War 53 precluded the within petitioner from seeking relief by writ of habeas corpus in the District Court. The petitioner contends that Article of War 53 did not preclude the District Court from acquiring jurisdiction of the Court-Martial Board for the following reasons:

(1) Article of War 53 is unconstitutional, in that, the "finality" provision thereof amounts to a suspension of the writ of habeas corpus.

(2) That Article of War 53 is not retroactive.

(3) Article of War 53 is not an indispensable prerequisite and mandatory condition precedent to the filing of writ of habeas corpus.

(4) That all administrative remedies were exhausted when the Judge Advocate General and the Secretary of the Army ruled on the prior appellate reviews.

The "Finality" Clause of Article of War 53 Renders the Statute Unconstitutional

The Solicitor General in his brief to this Court is of the opinion that the finality provision of Article of War 53 does not mean exactly what it says. He does not quarrel with the proposition that if such statutes did make the findings and holdings of the Judge Advocate General final and binding upon all Courts of the United States it would be clearly unconstitutional. His opinion is that it merely codifies that which has been the practice throughout the years. This interpretation by the Solicitor General is in direct conflict with the interpretation heretofore given by the Judge Advocate General (who passes upon applications for petitions for new trials). In the case of *Burchfield v. Hiatt*, 86 F.S. 18, 20, the Judge Advocate General (then acting as counsel for the respondent warden) contended that the "finality" provision of Article of War 53 precluded Federal Courts from making any inquiry whatsoever as to jurisdictional questions concerning Court-Martial Boards.

The Judge Advocate General's contentions were summarized by the District Court on page 20 of said decision wherein it is stated as follows:

> "He (Judge Advocate General) contends that the action taken by the Judge Advocate General under Article of War 53 is final and binding and may not be used in a habeas corpus proceedings, even though the Court-Martial Board was illegally constituted and without jurisdiction. * * * To construe Article of War 53 as respondent does would be to suspend the right of habeas corpus, which of course is prohibited by Section 9, Article 1 of the Constitution." (Material in parenthesis added).

In the case of *Whelchel* v. *MacDonald*, 176 Fed. 2nd 260, the Judge Advocate General (again acting as counsel for the respondent warden) contended that Article 53 precluded a Federal Court from inquiring into the jurisdiction of a Court-Martial Board. The Fifth Circuit Court of Appeals in their opinion (Page 262) stated that:

> "Article 53, 10 USCA 1525, provides for the grant of a new trial. * * * The action taken on such application is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the District Court on habeas corpus."

This same Court of Appeals thereafter in *Whelchel* v. *MacDonald*, 178 Fed. 2nd 760 again stated:

> "Moreover the last words of the amended Article of War 53 seems to make the action of the Judge Advocate General *denying a new trial binding* upon the courts of the United States." (Emphasis added.)

Thus we say that the Judge Advocate General has consistently contended that the finality provision of Article of War 53 precludes a Federal District Court from inquiring into the jurisdiction of a court-martial board.

The 5th Circuit Court of Appeals in the *Whelchel* v. *MacDonald* case was the pioneer in passing upon the finality provision and their decision in that regard has been followed by the Tenth Circuit Court of Appeals and was cited as the basis for the decision by the Sixth Circuit Court of Appeals in the within case. After having propounded and contended that the finality provision of Article of War 53 prevented Federal Courts from making any inquiry—and after several Circuit Courts of Appeals had adopted said construction, the Solicitor General now alleges that the petitioner has had a "misconstruction of the interpretation."

When the Uniform Code for Military Justice was presented on the floor of the Senate, the following expressions of Senator Pat McCarran, Chairman of the Senate Judiciary Committee, is set forth (96 Cong. Rec. page 1413):

"Mr. McCarran: Most important of all, the proposed code provides that the quondam court of military appeals—in fact an administrative body—in its decisions shall bind 'all departments, courts, agencies, and officers of the United States.' When it is noted that the only absolute right of appeal to this court is granted to Admirals and Generals alone, very careful scrutiny should be given the bill to determine whether or not an administrative agency can thus rob the Supreme Court of its appellate jurisdiction.

"Mr. McCarran: What does the bill mean when it says 'binding on all departments, courts, agencies or officers of the United States'? Does not that attempt to bind the courts?

"Mr. Kefauver: As I said, it is the same language at which was in the Kem amendment in 1948. It attempts to bind the courts on all matters except jurisdictional matters.

"Mr. McCarran: Why does it not say 'all matters except jurisdictional matters'?

"Mr. Kefauver: The Humphrey case, of course, decided that the Congress through its enactment, did not, and could not, under the Ninth Amendment to the Constitution, intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters. It was the decision of the Humphrey case that the courts still have jurisdiction, and that the law does not take away the jurisdiction of the courts in habeas corpus proceedings. * * * (Page 1415.)

"Mr. McCarran: * * * Nothing emphasizes my position more than does the reference made by the able Senator from Tennessee to a Supreme Court decision. Undoubtedly in the case to which he has referred, the Army was arguing that a writ of habeas corpus would not lie. There was no question about that. If they

argued it at that time, they will argue it again. Are we going to enact laws which will set aside the rights of civilians in the armed services, rights which are fundamental to the democracies of the world? It seems to me that we would be placing those rights in jeopardy. It seems to me that that question should be considered from a viewpoint other than the military viewpoint."

Petitioner Exhausted All Military Statutory Appellate Reviews

The Solicitor General and the Judge Advocate General (in the Court below) attempted to draw some sort of analogy between Section 2255 of Title 28, U.S.C.A. and A.W. 53. This contention is without merit and may be disposed of as was disposed of by Judge Underwood in the case of *Burchfield* v. *Hiatt*, 86, F.S. 18, 20 wherein he stated that:

"Section 2255 of Title 28 U.S.C.A., provides a remedy by motion for correcting or modifying a judgment in the court of conviction and requires recourse to this remedy, unless it is inadequate or ineffective, before applying for writ of habeas corpus, but this section is inapplicable here and its requirements cannot be read into Article of War 53, for a number of reasons. I think it clear, in the first place, that Congress had no such intention. If it had, it could easily have said so. The distinction between the civil courts and courts-martial is by the Constitution and laws and court decisions always kept clear. The provisions of Section 2255 are wholly inappropriate to Article of War 53. They refer to United States Courts, not courts-martial, while Article 53 is directed not to a court or court-martial, but to an executive officer, who is not bound by the law of the case, but is authorized, in his discretion, to grant a new trial, vacate a sentence, restore rights, and grant other relief, all partaking of the nature of executive clemency rather than the determination of rights in accordance with

judicial process. The application is to the Judge Advocate General, not to the court-martial which tried the applicant, and is passed upon not by the trial court, as under Section 2255, but by an executive officer acting for the President and under regulations prescribed by the President, who may finally dispose of the entire matter without even referring it back to the court-martial."

"* * * If the court-martial was without jurisdiction, the trial was a nullity and petitioner should be discharged; if it was illegally constituted, it was without jurisdiction."

The Judge Advocate General (as counsel for the within respondent before the Sixth Circuit Court of Appeals) stated in his brief filed (seven months after the effective date of A.W. 53) the following statement as set forth on page 11 thereof:

"It is well to look for a moment at the scope of inquiry within which a District Court is confined in a habeas corpus proceedings, specifically where there is involved the proceedings of a military tribunal *wherein there was had the complete military statutory appellate and review procedure.*"

We are at a loss to reconcile that view with the one propounded in this Court by the Solicitor General to the effect that the petitioner had not exhausted all administrative remedies (see pages 5 to 7, 11, respondent's brief).

It is the petitioner's contention that Article of War 50½, in effect at the time the petitioner was convicted by the Court-Martial Board and also in effect at the time that the Judge Advocate General examined said conviction and sentence, is the same as its successor statute, A.W. 53. A.W. 50½ (see Appendix A) provides that:

"When in a case in which * * * the Board of Review holds the record of trial wholly insufficient to sup-

port the findings, or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the Board of Review, such finding and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, * * *. In the event that the Judge Advocate General shall not concur in the holding of the Board of Review, the Judge Advocate General shall forward * * * his own dissent therefrom directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authorities or confirming authorities below, in whole or in part, with or without remission, mitigation, commutation or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part * * *. When the President or any reviewing or confirming authority disapproves or vacates a sentence * * * he may authorize or direct a rehearing, * * * Provided, that such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the Board of Review approved by the Judge Advocate General's holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authorities."

This is substantially the same proceedings as is contained in Article of War 53. The remedies contained in Article of War 50½ and the remedies contained in Article of War 53 differ very little in effect. The petitioner had exhausted all of these remedies prior to the time of the

filing of his writ of habeas corpus on the 28th of April, 1948. Must the petitioner after having complied with all available remedies resubmit his appeal before the Judge Advocate General's Department after having exhausted all of his remedies provided at the time of filing his writ of habeas corpus in the Federal District Court on April 28, 1948?

Respondent has stated to this Court that the finality clause of A.W. 53 is merely a codification of the finality rule which had already been in effect and recognized by the courts. If this is so, then the same finality that attaches to A.W. 53 did attach to A.W. 50½, in effect at the time petitioner was convicted and his case reviewed by the Judge Advocate General. It further follows that if the reviews of A.W. 50½ were "*final,*" then the petitioner exhausted all his administrative remedies at the time he filed his petition for a writ of habeas corpus in the District Court.

Major General Thomas Green, the Judge Advocate General of the Army, in comparing A.W. 50½ to A.W. 53, stated to the House Subcommittee of the Committee on Armed Services (Hearings: House 1, B.T. 2, 80th Congress, Hearing No. 125, page 1926):

> "Well, under the present law the case has come before a board of review, which consists of three officers of the Judge Advocate General's department. Certain of the court martial cases, those which involve a penitentiary sentence, those where the dishonorable discharge is not dispensed, all officers' cases and all death cases, are reviewed by these boards.
>
> "Now these boards, of which there are now four in my office, consider merely the legal sufficiency of the record. If the record is legally sufficient, they pass it. Thereafter somebody must take *the final action.* In some of these cases they come to me for *final action;*

some go to the Under Secretary of War and of course some go to the President."

Thus it is apparent that the reviews heretofore provided under A.W. 50½ represented a complete and full statutory appellate review by the military. In further discussions before the subcommittee General Green was discussing the proposed Judicial Council to be formed in the Judge Advocate General's office. His answer to the Chairman of that committee is extremely pertinent (page 1927):

"Mr. Elston: What appeal would there be from a decision of the Council?

"General Green: If it is approved by the Judge Advocate General there would not be any appeal. That is a *final appeal. It takes the place of what the Secretary of War does now, and what I do and in certain cases what the President does.*"

The within petitioner, Gusik, had his case reviewed by the Judge Advocate General and by the Secretary of War, both concurring in the findings and opinion of the Board of Review. That is the final appeal which General Green refers to under A.W. 50½, then in effect.

Upon what basis can it be held that the petitioner did *not* exhaust all administrative, military appellate reviews available to him?

We repeat, if the review under A. W. 53 represents a final review, then the review under A. W. 50½, the predecessor statute, is likewise final. Brigadier General Hubert D. Hoover, Assistant Judge Advocate General, stated to the House Subcommittee (page 2118):

"* * * paragraph (h) of Article 50 * * * expands the present provisions of Article of War 50½ with respect to the finality of court martials judgment. It is specifically provided that the findings and sen-

tences, the proceedings and the executed punishments under the sentences shall be final and conclusive. The plan is well established at present, but the amendment is somewhat more definite than the present article."

Thus, it may be seen that the same remedies available under A. W. 53 were available under A. W. 50½, and that the same procedures followed in A. W. 50½ were carried over into A. W. 53; and that the finality of A. W. 50½ represents a complete exhaustion of military appellate reviews.

In the case of *Wade* v. *Hunter*, 336 U. S. 684, the petitioner, Wade, was convicted under the provisions of the 1928 Manual for Courts-Martial,—as was Gusik, the within petitioner. Both Wade and Gusik went through the identical appellate review and procedures of the Judge Advocate General's Office. Justice Black, after reviewing the factual background of the case in *Wade* v. *Hunter*, supra, stated that:

"After exhausting his right to military review, petitioner brought this habeas corpus proceedings in a Federal District Court."

In the within case, the petitioner, Gusik, exhausted the same military appellate reviews and procedures that this Court has already declared constitutes exhaustion of the military reviews required. This is the same view taken by the Judge Advocate General who represented and was counsel for the respondent in the Court of Appeals below.

It is contended by the respondent that the Judge Advocate General has a better system for administering justice than the Federal District Court through its use of the Great Writ of Habeas Corpus. The form of relief provided for in A. W. 53 is substantially the same relief

that was available to the Judge Advocate General under the provisions of Article of War 50½, in effect when he reviewed the within cause under the appellate procedure thereunder. The Judge Advocate General, upon full and complete review, held that the court martial board had jurisdiction and that no errors affecting the substantial rights of the accused had occurred and that the record was legally sufficient and the sentence in conformity with law. So secure was the Judge Advocate General in his conviction, that as counsel for the warden in the District Court below, he reiterated the Judge Advocate General's findings, and urged it as a basis upon which the District Court should find against the petitioner. The District Court found that the court martial board did not have jurisdiction to try or sentence Gusik and thereupon granted the writ of habeas corpus. In the Sixth Circuit Court of Appeals the Judge Advocate General (again acting as counsel for the respondent warden) again reiterated his findings and declared there was no merit to the petitioner's contentions or the District Court's findings. It is now asked by the Solicitor General that the petitioner be required to again resubmit his case to the Judge Advocate General for reconsideration.

Would it not be a futile gesture to require one to submit one's case to the final consideration of that person (Judge Advocate General) who had previously held that there was no merit to the petitioner's contention and had so reiterated such contentions through the Federal Courts below?

Respondent contends that relief has been granted in 11.7 per cent of the cases adjudicated by the Judge Advocate General, under Article of War 53, and suggests that this relief accorded may well act as a substitute for the historic constitutional right to test the jurisdiction of a court martial board by the writ of habeas corpus in a Federal

court. Obviously, such a contention, to say the least, is without merit.

What does "relief" mean? Does it mean that a reduction of sentence from life to 16 years is a substitute and cure in a case where the court martial board had no jurisdiction to try or sentence a petitioner? Does the release of a prisoner upon parole act as a substitute for constitutional deprivations? Whether the figure be 11 per cent, 1 per cent, or 90 percent we dare not surrendered our constitutional rights for expediency. There can be no substitution for rights under the constitution.

The respondent further argues that Article of War 53 is a remedy "presently available at the very time petitioner is seeking to invoke the jurisdiction of the civil courts. He must exhaust that present remedy before he is entitled to pursue his petition for a writ of habeas corpus." (Page 19, respondent's brief.)

If that contention were sound then the petitioner might never have a Federal Court pass upon the jurisdiction of the Court-Martial Board. To illustrate the possibilities that would emanate from the adoption of such a contention let us assume that the within petitioner were to file a petition for a new trial, pursuant to Article of War 53 tomorrow. Let us assume further that the Judge Advocate General would deny relief and that the petitioner would file another application for a writ of habeas corpus in the Federal District Court. Let us further assume that the Federal District Court again finds that the Court-Martial Board was without jurisdiction and grants the writ. Assuming that the above procedure would take until after May 31, 1951, (the effective date of the new Uniform Code of Military Justice) to complete, the Judge Advocate General could then contend that the Federal District

Court did not have jurisdiction because there was yet a "remedy presently available at the very time petitioner is seeking to invoke the jurisdiction of the Federal Courts" (Respondent's brief, page 19). This would be so because under the new Uniform Code of Military Justice effective May 31, 1951, another step in the military appellate procedure is provided by Article 67 thereof which is a review by the Court of Military Appeals (yet to be established) consisting of three judges appointed from civilian life by the President * * * for a term of 15 years.

Thus, the petitioner would be on a merry-go-round, in that, his only salvation would be the hope that he could have a complete process through all the courts before the law was further amended. Of course this is not the result intended by, nor the intention of Congress; nor can it be given such construction by this Court.

Respondent urges that to compel the petitioner to avail himself of A. W. 53 would not be a retroactive application of A. W. 53. By what processes this legal conclusion is reached is not set forth. In urging the Sixth Court of Appeals to hold that the petitioner had not exhausted his military appellate reviews, the Judge Advocate General, as counsel for the respondent before that Court, stated in his reply brief that (page 45):

> "In the case at bar it is clear from the context of the statute (Article of War 53, supra) that the purpose of the statute required that it be applied retrospectively and that the facts to which it relates are, of necessity, drawn from an antecedent time."

It is contended by the respondent that the petition for new trial is an indispensable prerequisite in the exhaustion of administrative reviews of a military conviction. Repondent further contends that A. W. 53 is not a mere per-

missive formal type of petition for rehearing. It stands uncontradicted that the "right" to a new trial or the "right" to a hearing upon the application for a new trial is within the sole discretion of the Judge Advocate General. The language further provides that it is not mandatory for the accused to file a petition for new trial but he "may" file such an application; nor does the act provide that it is mandatory upon the Judge Advocate General to so grant such application. The reading is that he "may" grant such application "upon good cause shown" and "in his discretion". As was stated by the Judge Advocate General in respondent's brief (page 10) wherein the following conversation took place at the hearing before the Subcommittee on Armed Services:

> "Mr. Elston. And in the second place, the Judge Advocate General would have the discretion of saying whether or not the petition could be entertained.
>
> "General Hoover. Yes, sir. His decision in that respect would have to be final, and it is so provided in the amendment.
>
> "Mr. Elston. Why shouldn't it be an absolute right rather than discretionary right?
>
> "General Hoover. Because good cause ought to be shown before the Government is put to the expense of a new trial. If it were not discretionary, I think we should have to retry a great many cases where there would be no reasonable cause for a new trial. * * *".

It is stated in the case of *Woods, Housing Expediter* v. *Ginocchio*, 180 Fed. 2nd 484, Feb. 17, 1950, C. C. A. 9th that:

> "It is well established that one need not proceed with optional administrative processes before seeking relief at law from error of the administrator. Levers v. Anderson, 326 U. S. 219, 233, 66 S. Ct. 72, 90 L. Ed.

26; Tucker v. Alexander, 275 U. S. 228, 231, 48 S. Ct. 45, 72 L. Ed. 253; United States v. Abilene and Southern Ry. Co. 265 U. S. 274, 282, 44 S. Ct., 565 68 L. Ed. 1016; Prendergast v. New York Tel. Co., 262 U. S. 43, 49, 43 S. Ct. 466, 67 L. Ed. 853".

It is also stated in the case of *U. S.* v. *Pearce Auto Lines* (1945) 327, U. S. 515, 535:

> "Except in the single instance (Atcheson T & S F & R Co. v. U. S. 284 U. S. 288) it has been held consistently that rehearing before administrative bodies are addressed to their own discretion."

In the case of *Gibson* v. *U. S.* 329, & S. 338, 350 (1946), this Court similarly passed upon the exhaustion of remedies required of one allegedly in violation of the Selective Service Laws. In that case the Government contended that the petitioner had not exhausted his remedies in that he he failed to report to the Army camp. This Court stated "exacting this would strain the requirements of exhausting the administrative process beyond any reason supporting it."

In the case of *Hirota* v. *MacArthur Gen.* 338 U. S. 197, 201 (1948) Justice Douglas stated in his concurring opinion that was rendered in June, 1949 that:

> "Habeas Corpus is a historic right and one of the specific safeguards for personal liberty. See Bowen v. Johnston, 306 U. S. 19, 26. There is no room for niggardly restrictions when questions relating to its availability are raised. The statutes governing its use must be generously construed if the great office of the writ is not to be impaired."

For the reasons stated in this argument and in our previous briefs it is respectfully submitted that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

ARTICLE OF WAR 50½. Review: Rehearing.

The Judge Advocate General shall constitute, in his office, a board of review consisting of not less that three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of re-

view holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part: Provide, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: Provided further, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence

in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments

and officers of the Government: Provided, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: Provided further, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the Board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.